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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and concurring opinions in the court of appeals (A. 3–13)[1] are reported at 412 F. 2d 421.

[1] "A." refers to the Appendix in this Court. "R." refers to the clerk's record of the criminal proceeding, containing the indictment, pleadings, and orders. (As noted at Pet. Br. 6–7, petitioner had earlier been a plaintiff in a civil proceeding, a pre-induction suit for injunctive relief, the record of which was treated by stipulation as part of the record in the criminal case and is on file with the Clerk of this Court. The district court denied the injunctive relief sought and, following petitioner's refusal to submit to induction and the commencement of the criminal prosecution, his appeal from that judgment was dismissed as moot.) "Tr." refers to the transcript of the criminal trial; "Civ. Tr.," to the transcript of the civil trial; and "G. Ex. 1," to petitioner's Selective Service file (Government Exhibit 1 at trial).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969, and a petition for rehearing was denied on August 29, 1969 (A. 2). The petition for a writ of certiorari was filed on September 25, 1969, and was granted on January 19, 1970 (A. 92). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the local board abused its discretion, under the pertinent regulations, in refusing to reopen petitioner's classification as a result of his belated claim to conscientious objector status.

2. Whether the local board considered petitioner's request for conscientious objector status fairly and competently.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute (50 U.S.C. App. (Supp. IV) 456(j)) and Selective Service regulations (32 C.F.R. 1625.2, 1625.4, 1625.11, and 1625.13) are set forth in Appendix A to petitioner's brief (Pet. Br. App. 1a, 4a–7a).

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (R. 2; Tr. 203). On April 8, 1968, he was sentenced to

five years' imprisonment and fined $10,000 (R. 20). The court of appeals affirmed.

1. Petitioner, now 25, registered with Selective Service Local Board No. 47, in Louisville, Kentucky, in June 1962, shortly after his eighteenth birthday. In June 1963 he completed and returned to the board a classification questionnaire in which, under the section headed "Conscientious Objector," he wrote "Does Not Apply." In November 1963 he was classified II–S (college student deferment) and, except for a brief period in 1964 not here pertinent, he retained that classification until March 1966 (A. 4; G. Ex. 1).

In January 1966, petitioner quit college and became employed by Appalachian Volunteers, an anti-poverty organization funded by the Office of Economic Opportunity, as an assistant to the Director of Field Operations (A. 4, 25; G. Ex. 1). On February 23, 1966, he wrote to the local board advising it of his change of status and requesting an occupational deferment (A. 24). At petitioner's request, the Associate Executive Director of Council of the Southern Mountains, Inc., an affiliated group, also wrote to the board describing petitioner's work and asking that he be deferred in the national interest (G. Ex. 1; A. 25). On March 17, 1966, petitioner was given a II–A classification (occupational deferment), to expire in March 1967 (A. 4, 31; G. Ex. 1).

On March 1, 1967, petitioner advised the local board by letter that he was still employed by Appalachian Volunteers, described and stressed the importance of his work, and requested renewal of his II–A deferment (A. 25–26). Petitioner's supervisor also asked the

board to allow petitioner to "continue his vital role" in the organization's program (A. 27–28). On May 11, 1967, in accordance with its policy of limiting deferment in such cases to one year, the board denied the requests and reclassified petitioner I–A (G. Ex. 1; Civ. Tr. 31–32).

On May 17, 1967, petitioner was ordered to report for a pre-induction physical examination on June 26, 1967 (A. 32). On May 19, in a letter addressed to "Appeals Board, Selective Service, Local Board No. 47" (which was delivered to the local board on May 23), petitioner wrote that the letter was "an official appeal to you to review and reconsider my request for an occupational deferment." Noting that he had previously been classified II–A on the basis of his work among the rural poor in the mountains of Kentucky, he said he was more deeply involved than ever in his activities and that at least one more year was needed to achieve satisfactory results (A. 29). Due to the temporary absence of the clerk of the local board, no immediate reply was made to that letter (A. 30). On June 26, 1967, petitioner reported for the ordered physical examination, was examined and was found qualified for induction (A. 32).

On July 3, 1967, the clerk of the local board wrote petitioner that the board had not overlooked his letter of May 19.[2] The clerk explained that she had been absent when the letter arrived and had not previously had the opportunity to respond to it, and asked whether petitioner wished the board first to review his

[2] The clerk referred to it as his letter of May 23 (the date the board had received it).

file and then forward it to the appeal board, or simply to forward it to the appeal board without further local board consideration (A. 30). On July 10 petitioner replied that he did not fully understand the procedures to which the clerk had referred; noted that he had been reclassified I–A in May; said he had appealed that classification "on the grounds of occupation" and had requested renewal of his II–A deferment; and asked the clerk to do what was necessary to see that his classification was reconsidered (A. 31).

On July 17, 1967, petitioner was ordered to report for induction on August 17 (A. 32). On July 20, 1967, he wrote the local board that he had been advised by counsel that the order to report for induction was invalid because he had had a timely appeal outstanding since May 23. He requested that the induction order be canceled, that the appeal be forwarded to the appeal board, and that he be granted a personal appearance (A. 33–34). On the same date, at petitioner's request (see A. 32), the Director of Field Operations of Appalachian Volunteers wrote the local board to inquire whether the issuance of the induction notice had been an oversight on the board's part. He noted that petitioner had been working for the organization for a year and a half, said that the work he was doing was of vital importance and that his replacement would be difficult, and expressed the hope that the board would give favorable consideration to the request for a continuation of petitioner's deferment (A. 34–35).

The board denied petitioner's request for a personal appearance since it had not been made within 30 days

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after the notification to him of his I–A reclassification, as required by 32 C.F.R. 1624.1(a) (A. 5). However, on July 25, 1967, although petitioner's time within which to appeal had expired, the local board, because of the apparent misunderstanding as to whether petitioner had intended his May 19 letter to be a notice of appeal or simply a request for local board reconsideration, cancelled the order to report for induction and forwarded petitioner's file to the appeal board (A. 35–36).[3] On August 16, 1967, the appeal board, by a 5–0 vote, rejected petitioner's request for continuation of his deferment and also classified him I–A. On August 28, petitioner and his employer were advised by the local board of this action (A. 14; G. Ex. 1).

On September 2, 1967, petitioner advised the local board by letter that he had been arrested on August 12 by officers of Pike County, Kentucky, and charged with sedition against the State of Kentucky; that the case was then pending in the United States District Court for the Eastern District of Kentucky, at Lexington (in a proceeding before a three-judge court to enjoin the State prosecution, see Pet. Br. 4 and *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.)); and that he would keep the board informed of developments (A. 37). On September 21, 1967, petitioner was again ordered to report for induction, on October 16, 1967 (A. 14). On October 9, 1967, petitioner advised

[3] The clerk, in advising petitioner of the board's actions, said that the issuance of the order to report for induction had not been an oversight. She explained that she had been instructed by the board to issue the order so that there would be no question of his having been skipped over (A. 36).

the local board and the State Selective Service Director that his "legal complications" had not been resolved; that he was "still under $5,000 bond" to the federal court; that the decision of the federal court (invalidating the Kentucky sedition statute and enjoining the State prosecution, see *McSurely* v. *Ratliff*, *supra*[4]) might be appealed to this Court, in which event the case could "drag on for several more months"; and that, in addition, he was under bond in the amount of $250 to a State court in Pike County on a still-pending charge relating to a deadly weapon. Stating that he had been advised that he could not be ordered to report for induction while he had a court case pending, he asked the board to cancel the September 21 induction order (A. 38–39). On October 12, 1967, at the suggestion of the State Director, the local board cancelled the induction order and advised petitioner that since he was "under the jurisdiction of the Court" he would be considered for a IV–F classification (A. 39–40).

2. On October 17, 1967, petitioner advised the local board that after much thought he had come to the conclusion that he was a conscientious objector and asked the board to send him the special form for claiming that status (A. 41–42). The clerk routinely sent him the Special Form for Conscientious Objector (SSS

[4] The order of the court had apparently been entered September 14, 1967 (see 282 F. Supp. at 851). The opinion and a dissenting opinion were filed subsequently, on October 18 and 20, respectively (*id.* at 848). The decision was not appealed. A related facet of the proceeding (involving a request for the return of seized documents) was before this Court in *McSurely* v. *Ratliff*, 389 U.S. 949, 390 U.S. 412, 390 U.S. 914.

Form 150) (Civ. Tr. 57–58), and he completed and returned it on October 30 (A. 14–23).

Petitioner stated in the form that he was conscientiously opposed by reason of religious training and belief to participation in war in any form (A. 15; G. Ex. 1). He said that he believed in a Supreme Being; that the belief involved duties superior to those arising from any human relation; that his religious training had taught him that it was against God's law to kill; and that he believed in Jesus' message of love for all mankind (A. 15, 19). In response to the inquiry as to how, when, and from whom he had received the training and acquired the belief upon which his claim was founded, he said that he had been born and reared a Catholic, and that in the eighth grade he had decided to become a priest, but that while in high school he had decided to wait because, though knowledgeable in the teachings of Christ, he was still ignorant as to their real significance and felt that he needed more experience. Petitioner further stated that he had gone through a religious crisis in college in which he had fancied himself an agnostic and an atheist, but that he had returned to the Catholic Church and had discovered and been much influenced by the writings of Thomas Merton. Merton was non-violent, petitioner said, but while Merton was also a contemplative, petitioner felt drawn to a more active life, in which he could work with people and help right the injustices of the world. Having become involved with the Appalachian Volunteers at about this time, petitioner's response continued, he threw himself into his work with "missionary zeal." As he grew and participated in the

world, he revalued what he had learned as a child. He said that he now placed love of his fellow man above regular church attendance. He had learned in his work of the significance of love and understanding and the futility of violence; that too many poor people had been "used and walked on by the power hungry courthouse gangs"; that there was an urgent need for the poor to become organized and for the rich to be educated; and that this must be done in a non-violent way. Although as a young man he had not been taught to oppose violence as such, he said, he had been taught not to kill and to love all men. "This coupled with my adult experience," he concluded, "has brought me to my present position. It was only through and after my adult experience that I became a CO" (A. 16, 19–22).

In response to the form's inquiry as to the circumstances, if any, under which he believed in the use of force, petitioner said that he believed "in the force of non-violence." Asked to describe the actions and behavior in his life which in his opinion most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote that he was spending his life non-violently working among the poor; that he had once successfully urged non-violent methods while helping to organize resistance to strip mining, and that as a consequence of that appeal bloodshed had been averted in a tense situation; that he had supported peace demonstrations to end the Vietnam conflict; and that he had written letters to his Senators and signed a petition to the President urging a negotiated peace

in Vietnam. In reply to an inquiry as to when and where, if at all, he had given public expression to the views relied upon as the basis of his claim to being a conscientious objector, he said that he had trained groups of VISTA volunteers for work in Appalachian communities, and that he had on several occasions told such groups that non-violent change was what was needed in eastern Kentucky. He further stated that he had led discussions concerning non-violent organizing techniques and had given his views on the subject privately to friends, and that he had stated under oath in the federal proceeding arising out of the sedition charges that he did not advocate the violent overthrow of any government (A. 16, 22). Asked to describe carefully the creed or official statements of the religious sect to which he belonged in relation to participation in war, he wrote that Pope Paul had said before the United Nations: "No more war, no never again. If you wish to be brothers let the weapons fall from your hands" (A. 17).[5]

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[5] What the Pope said, in relevant part, according to the official English translation, was (New York Times, October 6, 1965, p. 6, cols. 3–5):

> * * * It suffices to remember that the blood of millions of men, that numberless and unheard of sufferings, useless slaughter, and frightful ruin, are the sanction of the pact which unites you, with an oath which must change the future history of the world: No more war, never again war. * * *
>
> * * * * *
>
> If you wish to be brothers, drop your weapons. One cannot love with offensive weapons in hand. * * * As long as man remains that weak, changeable and even wicked being that he often shows himself to be, defensive arms will, un-

Reverend William F. Browne, Catholic pastor of a church to which petitioner said he was spiritually close, and whose name petitioner submitted to the board as one who could give information as to the sincerity of petitioner's professed convictions against participation in war (A. 17, 18), advised the board by letter that he could attest to petitioner's moral integrity and veracity, and that because petitioner's "personal conscience finds that participation in war is incompatible with his moral convictions, * * * military service would do violence to his conscience." Reverend Browne wrote that the Catholic Church had always maintained that participation in a just war is morally defensible, but that moral theologians and the Church had at the same time insisted that each individual must follow his own conscience. In view of the Church's defense of the inviolability of the individual's conscience, he asked that petitioner's request to be classified as a conscientious objector be granted (A. 51–52).

Thorsten Horton, a friend of petitioner who had directed a field study project in which petitioner had participated, and whose name petitioner also gave the board as one who could vouch for the sincerity of his convictions (A. 18), wrote to the board that he had observed in petitioner "genuine Christian love" and "concern for the Christian brotherhood of Man," and that in his estimation petitioner could not have en-

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fortunately, be necessary. You, however, in your courage and valor, are studying the ways of guaranteeing the security of international life without recourse to arms. That is an aim worthy of your efforts * * *.

dured the persecution he had received arising out of his recent court experience in the sedition proceedings if he had not had faith in the goodness of man. Mr. Horton said that in a recent encounter between a coal company and an organization called the Appalachian Group to Save the Land and People, petitioner had demonstrated his belief in non-violence by persuading members of the group to leave their arms at home, thus averting what could have been a terrible waste of human life (A. 49–50).

Carl Braden, another friend of petitioner (A. 18), advised the board by letter that petitioner was a conscientious young man who was working hard to help bring about a better world for poor people. Mr. Braden said that petitioner had told him many times of his dedication to the view that peaceful action was the way to solve our problems and that war only makes the problems worse (A. 43–44).

Edith Easterling, a co-employee of petitioner's, wrote the board that she and petitioner had been working together for nearly two years trying to "bring democracy" to eastern Kentucky, and that petitioner had played an important part in the struggle and would be impossible to replace if he had to leave. Miss Easterling wrote that she had often talked to petitioner about violence in this country and that she knew him to be a peaceful person. She confirmed that petitioner had cautioned against the use of violence in the incident involving strip mining to which he referred in his Form 150 (A. 53).

Robert Mulloy, petitioner's brother, wrote to the board that while he vehemently disagreed with peti-

tioner's unwillingness to bear arms, he believed petitioner was sincere in his feelings, and noted that petitioner had maintained this position for a number of years (A. 54).

3. In his letter transmitting the completed Form 150 to the board, petitioner advised that he had been informed by his lawyer that he was "still under bond to the Federal Court" and he requested "a personal interview * * * to discuss my appalachian [*sic*]" (A. 47). The clerk replied that although the time within which to request a personal appearance as of right had lapsed, the board had decided to grant him a personal appearance, on November 9, 1967, as a matter of "courtesy" (A. 48).[6]

On November 9, 1967, petitioner appeared before the board for the courtesy interview and the board received and placed in the file the letters submitted in support of his request for conscientious objector status (A. 43–44, 49–57). The interview lasted ten or 15 minutes and was attended by three of the board's four members—Chairman J. Allen Sherman and Members Frank Wolking and Robert Downes (A. 56,

[6] Although petitioner's time within which to secure a personal appearance as of right, under 32 C.F.R. 1624.1(a), had expired, authority for the granting of a "courtesy" appearance is to be found, as the court of appeals noted (A. 5–6), in 32 C.F.R. 1625.1(c), under which local boards are directed to "keep informed of the status of classified registrants" and are authorized to question registrants and take "other steps" to that end. As explained by the chairman of the board, a courtesy hearing is in the nature of "an accommodation" to a registrant whose time for an appearance as of right has expired, made "in an effort to lean over backwards" to ensure that the registrant be given every opportunity to express himself (Civ. Tr. 34–35; cf. Tr. 130–131).

66, 76–77, 81–82).[7] During the interview petitioner was given complete freedom to express himself as to why in his opinion he ought not to be drafted (A. 66–67, 77; Tr. 156–157, 162–163). His principal statement, according to the recollection of Chairman Sherman, "was in relation to his work and the importance of his work in the mountains of Eastern Kentucky" (A. 67). He presented, Sherman recalled, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (A. 69). Sherman further stated, "Principally it was the same deal, that he was seeking occupational deferment" (A. 68). Member Wolking's "only recollection" of petitioner's remarks was, similarly, that he "felt like his work in Appalachia was very important and was at least important to him and he felt like he * * * should have Conscientious Objector status because of that * * *" (A. 83).[8] At the conclusion of petitioner's

[7] Member Robert Rickert, although he later participated in the decision not to reopen petitioner's classification, was not present at the November 9 meeting (A. 87–88).

[8] Petitioner testified that the atmosphere at the interview was polite but tense; that there were "hard stares" from the members; and that he was asked "belligerent" questions, including whether he was claiming to be a conscientious objector "just * * * to get out of the draft" and whether he felt any obligation to serve his country. Petitioner said he answered "no" to the first question and, to the second, that he felt he was already serving his country in the work he was doing in eastern Kentucky. He testified that after he had explained the development of his conscientious objector beliefs he was asked if he felt that his work was important; that he answered that he thought so; and that, in reply to an inquiry by a member as to

statement the chairman asked him if there was anything he cared to add and, when petitioner indicated there was not, the interview terminated (A. 67; Tr. 156–157, 162–163).

A résumé of petitioner's statement, prepared by the clerk and placed in his file, states that petitioner "advised that he was claiming a C.O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did," and that he "felt that military service would interrupt his work and there would be no one else to take his place" (A. 56). The résumé further indicates that petitioner advised the board that he would remain under bond to the federal court as long as the time for appeal in the case arising out of the sedition charges was running, and that the clerk was instructed to write to the federal court to inquire about the appeal and the bond. Until a reply was received the board "would not consider him as a C.O." (A. 56–57). The minute entry in petitioner's file re-

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whether he could be replaced, he said that that would be difficult due to the nature of his work (Tr. 154–156).

Chairman Sherman testified that few if any questions were asked at the interview and that he did not recall what the questions were, but that he was sure petitioner was not asked if he had filed the C.O. claim just to get out of the draft or if he felt any obligation to serve his country (A. 67–68; Tr. 178). Member Downes did not recall either of those questions being asked, did not remember asking any questions himself, and had the impression that petitioner "did all of the talking" (A. 77; Tr. 99–100). Member Wolking, the only other member present, did not remember asking any questions himself, and had no recollection of any other member doing so (A. 82).

flecting the action taken at the November 9 meeting states that his "classification was not re-opened" (A. 14).

Chairman Sherman testified that after petitioner had absented himself following the interview the three members present discussed the case for eight or ten minutes and came to the unanimous conclusion that there was no basis or justification for reopening his classification (A. 67, 68–69; Civ. Tr. 48). No formal vote was taken at that time, however, because according to Sherman's understanding the time for taking an appeal in the federal proceeding arising out of the State sedition charges had not yet run. It was therefore decided to hold the matter in abeyance pending the outcome or clarification of those proceedings (A. 70; Civ. Tr. 45–47, 49–50, 56, 58–59; Tr. 126).

4. On November 14, 1967, petitioner wrote to the board (A. 58–60)[9]:

> I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.
>
> These are certainly troubled times in this country. * * * I believe that another revolution is beginning to take place in this country, that this country's government can no longer deal with its internal problems.

[9] The printed copy of this letter that appears in the Appendix is incorrectly dated November 12, 1967 (A. 58). The correct date is November 14, as indicated (G. Ex. 1). The opinion below, after correctly noting that the letter was received by the board on November 17, 1967 (A. 6), later inadvertently refers to it as dated that day (A. 10). Although the date of the letter is inconsequential, these discrepancies are noted to prevent any possible confusion.

I of course hope that this revolution takes a non-violent form. It is important that men begin now to understand each other. That is why I hope that you understand me. You have me over the barrel, so to speak, in that you have the law behind you. But I remind you that I am an organizer. That I have dedicated my life to change and to the constant struggle that is democracy. There is nothing that can stop me from organizing against something I don't believe.

This brings us to the war in Vietnam and my draft situation. I do not question individual integrety [*sic*] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.

I told you I felt that I was serving my country's needs here in Pike County. That was no frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must

> do this to bear witness to my beliefs and to cause my fellow citizens to think.
>
> I know that I will eventually face prison. I am not afraid of that. Greater men than I have pulled time for practicing what they believe. * * *

On December 2, 1967, petitioner advised the board by letter that he had been "fired" by Appalachian Volunteers for claiming conscientious objector status and for stating that he would refuse induction if ordered. He said that he felt badly about being released from his job, but that a person must have the "conviction of his beliefs," and he asked the board to consider his loss of employment as a public demonstration of his C.O. convictions. He further advised that so far as he knew he was still under bond to the federal court (A. 61).

On December 6, 1967, the local board received a letter dated October 26 from the clerk of the federal district court to the Kentucky State Selective Service Headquarters, advising that petitioner had recently been a plaintiff in an action on the court's civil docket, but that so far as the clerk knew he had never been a defendant in any case in that court, civil or criminal (A. 46).[10] On January 3, 1968, petitioner advised the

[10] The letter was a reply to an inquiry made by State Headquarters on October 24 as to whether petitioner was still under the jurisdiction of the court. The inquiry had noted that petitioner, a registrant subject to induction, could not be inducted while he was under the court's jurisdiction (A. 45). A like inquiry, which referred to petitioner's October 9 statement that he was under bond to the Pike County Court in connection with a charge of flourishing a deadly weapon, had been addressed to that court (A. 44-45). It does not appear what response, if any, was made to that inquiry.

local board that the sedition charge against him had been dropped and the bond involved in that case released; he said he was unsure about the Pike County bond but that he thought it had been dropped, and that he was awaiting word from his lawyer on that charge (A. 62).

On January 11, 1968, the local board, after considering "[a]ll information in file * * * including [the] claim of Conscientious Objector" status, voted 4–0 not to reopen petitioner's classification. "All Members present," according to the minute entry of the board's action, "felt this information did not warrant re-opening" of the I–A classification (A. 14). Board Member Rickert, who had not attended the November 9 courtesy interview, participated in the decision after reviewing petitioner's file and discussing the matter with the other members (A. 87–88). On January 21, 1968, following notification of the board's action (A. 63), petitioner wrote to the board: "I appeal your failure to reclassify me I–O. I consider the interview in November a re-opening of my case" (A. 64). On January 23, 1968, the board replied that the November appearance had been granted merely as a matter of courtesy, since petitioner's time for requesting a personal appearance as of right had expired, and that the board did not consider the interview to constitute a reopening of his classification (A. 65). On the same day, petitioner was ordered to report for induction on February 23, 1968. Petitioner reported as directed, but refused to submit to induction (A. 14).

5. At trial petitioner called all of the members of the local board as witnesses and cross-examined each

as to the basis of the board's decision not to reopen his classification (A. 66–72, 74–91). Chairman Sherman testified in relevant part (A. 71–72):

> Q. Is it your position that the statements that Mr. Mulloy made in SS Form 150 and the statements that he made on the interview and the supporting letters that were sent, even if true, would not justify a reopening of his classification?
>
> A. Taking everything that he—he did not make out—his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.
>
> Now, I went over his 150 Form. What's in it, now, I couldn't tell you. * * * His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.
>
> * * * * *
>
> Q. Is it your position that on all the information that you have, that is, his testimony at the hearing, his answers on SS Form 150 and other information in his file, this did not make out a case that he was entitled to a deferment?
>
> A. Well, I think the file speaks for itself. The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished to us, the letters he had sent in with his 150 Form and the information that he had given when he appeared in person.

Member Wolking said that the board assumed petitioner was sincere, but nonetheless felt that the evi-

dence did not warrant reopening because his claim to C.O. status was based essentially on the importance of his work (A. 83, 84, 86). Wolking testified (A. 84, 86):

> Q. And [are you prepared to state under oath] that everything he said and all of the evidence he produced even if true, would not entitle him to the classification that he claimed?
>
> A. That is the way I felt and that is the way I voted.
>
> * * * * *
>
> Q. As I understand it then, you did not inquire into his sincerety [*sic*], but the prima facie case that he presented?
>
> A. That is quite true.
>
> Q. Assuming that he was sincere?
>
> A. We assumed he was sincere, that's right.
>
> Q. You stated that he talked about or based his claim on the importance of his work in Appalachia?
>
> A. That is the impression I have or that is the impression I remember.
>
> Q. He was asking for a Conscientious Objector status because he had important work in East Kentucky?
>
> A. That's right.
>
> * * * * *
>
> THE WITNESS: I mean everything that was in the Form 150 and, everything he said, in other words, everything was taken into consideration in the record and that's what my decision was based on.
>
> Q. And that even—in other words, you did not question his sincerity, I take it?
>
> A. That is correct.

The other board members, Downes and Rickert, were not questioned as to whether they regarded or assumed all of petitioner's statements to the board to be true, or his claim a sincere one, and they gave no testimony pertinent to those points.

All four members testified that they felt they had given full, fair, and unbiased consideration to petitioner's case (Tr. 110, 115–116, 128–129, 132–133, 144–145, 178).

SUMMARY OF ARGUMENT

I

The local board properly refused to reopen petitioner's classification.

A. 32 C.F.R. 1625.2 provides that a local board may reopen a classification where new facts are alleged which, if true, would justify a change in the registrant's classification. In contrast to the explicitly mandatory nature of several of the companion provisions, this section of the regulations gives discretion to the board whether to reopen in those circumstances. It is necessary to the effective operation of the Selective Service System for local boards to have discretion whether to reopen in such a situation; indeed, if the boards were required, as petitioner contends, to reopen whenever what might be termed a *prima facie* case for reclassification was presented, registrants could interminably delay their induction merely by filing successive claims for exempt or deferred status and alleging the necessary facts to support each claim, regardless of how inherently suspect those facts were.

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, and the board has no reason to question the truth or sincerity of the representations, refusal to reopen would be unreasonable and hence an abuse of discretion. But where, as in this case, the board has compelling reasons for doubting the veracity or sincerity of the allegations, it need not automatically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), it can scrutinize the representations and inquire further. And if the board's scrutiny of the representations is to be consistent with 32 C.F.R. 1625.2, it must be accomplished as part of the process of determining whether to reopen. If the board must reopen *in order to* scrutinize, the discretion which the regulations gives is illusory and a registrant can compel reopening (with its concomitant opportunities for appearance and appeal—and thus substantial delay) simply by making the necessary allegations.

In this case the board had ample reason to question the truth of petitioner's allegations relating to his religious beliefs. The timing of petitioner's claim gave rise to an understandable concern that it might be merely a delaying tactic. Furthermore, petitioner's Form 150 and several of his reference letters focused repeatedly on petitioner's work in Appalachia; this understandably led the board to wonder whether petitioner's belated claim to C.O. status was merely an attempt to reopen the issue of the relevance of his work in Appalachia to his draft status. Petitioner's presentation at the courtesy interview provided by the

board caused the board to have even greater doubts as to the depth of his claimed C.O. convictions and the nature of their alleged religious basis, for, once again, petitioner neglected the relevant question of religious beliefs and centered his argument around the importance of his work in Appalachia. Against this background, the board could properly consider the representations made in the Form 150 in the light of these substantially contemporaneous statements, and conclude that no credible *prima facie* case of entitlement to C.O status had been presented.

Our view of 32 C.F.R. 1625.2 does not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening. Petitioner's contention that it does erroneously assumes that the classification process consists merely of inquiring into the truth or falsity of the facts stated by the registrant. Normally, however, classification requires the local board, after it has determined the facts, to evaluate them and determine what weight to assign to various elements in the registrant's situation. Our interpretation leaves ample room for a procedure whereby a classification is reopened for the purpose of considering and evaluating new facts, but where the registrant, after reconsideration, is given the same classification he previously had—without any implication that the facts stated in the reclassification request were untrue. Indeed, the board's approach here of granting petitioner a "courtesy interview" introduces a desirable amount of flexibility into the system that the rigid rule petitioner proposes would prevent.

B. The board did not assume that petitioner was sincere in his claim to be a conscientious objector. Member Wolking's statement that the board assumed petitioner's sincerity, read in the light of the witness' other testimony, must be taken to have meant only that the board assumed petitioner was sincere in his remarks at the courtesy interview about the importance of his work in Appalachia. Indeed, if the members assumed petitioner was sincere in his claim to be a C.O., it would have been inexplicable for them to have voted not to reopen.

C. There is no merit to petitioner's contention that since a registrant whose claim to be a conscientious objector is denied at the time of his original classification is entitled as of right to take an administrative appeal, and since a registrant whose claim is denied following reopening and reconsideration of an existing classification can similarly appeal as of right from the board's decision on the merits, it is impermissibly discriminatory to refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a credible *prima facie* case of entitlement to that status. It is not unreasonable to require that a registrant who first advances a claim to conscientious objector status after he is originally classified make a credible *prima facie* showing that he has a right to that classification before the rights to a personal appearance and an administrative appeal, with their attendant delays, should accrue.

II

The local board considered petitioner's request for conscientious objector status fairly and competently.

A. All members of the board read petitioner's representations in the Form 150 prior to the taking of the vote not to reopen and all testified that they felt they had given full, fair, and unbiased consideration to his case. Petitioner's speculations as to the degree of care with which the members read the statements in the form raise no issue of constitutional magnitude.

B. None of the instances cited by petitioner of alleged lack of comprehension of the applicable law on the part of the board members is substantial. In any event, there is no basis for petitioner's claim that the board as a body exhibited such misunderstanding of the law as to suggest that it lacked competence to pass intelligently on his C.O. claim.

ARGUMENT

I. THE LOCAL BOARD PROPERLY REFUSED TO REOPEN PETITIONER'S CLASSIFICATION

A. WHETHER TO REOPEN IS DISCRETIONARY UNDER THE REGULATIONS, EVEN WHERE THE NEW FACTS ALLEGED WOULD, IF TRUE, JUSTIFY A CHANGE OF CLASSIFICATION

32 C.F.R. 1625.2 provides that a local board "may reopen and consider anew the classification of a registrant," upon his written request, if the request "is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification," even after an induction order has been issued to the registrant.[11] If the board re-

[11] In the latter circumstance, a proviso precludes reopening "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which

opens, it is directed to consider the new information and to classify the registrant again, "in the same manner as if he had never been classified"; similarly, the registrant has the same right to appear personally before the board and to appeal administratively, as in the case of an original classification, even though he is given the same classification he had before the reopening (32 C.F.R. 1625.11, 1625.13). If the board feels that the information accompanying the request fails to present any facts not considered when the registrant was classified, or that the new facts, if true, would not justify a change of classification, the board "shall not reopen the registrant's classification" (32 C.F.R. 1625.4). In such a situation, there is no right of personal appearance or of administrative appeal. The board in that event merely advises the registrant by letter that the submitted information does not warrant reopening and places a copy of such letter in his file (*ibid.*).

Petitioner contends that the new information which he presented to the local board along with his request that his classification be reopened, consisting of the representations made in his completed SSS Form 150

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the registrant had no control." Cf. *DuVernay* v. *United States*, 394 F. 2d 979 (C.A. 5), affirmed by an equally divided Court, 394 U.S. 309. It should be noted that the regulation also authorizes reopening and reconsideration on the board's "own motion" if the action is similarly based upon previously unconsidered relevant facts.

and in the accompanying letters, constituted a *prima facie* showing that he was entitled to conscientious objector status, *i.e.*, a showing of facts not previously considered which, if true, would justify his reclassification to I–O; that the board was therefore required to reopen his classification, evaluate the new information, and reclassify him (to I–O or again in I–A); and that, by refusing to reopen, the board improperly precluded him from taking an administrative appeal—a procedural right to which he was entitled. Alternatively, he argues, the board by its actions did in fact reopen, evaluated the new information, and again classified him I–A. Whichever course the board is deemed to have followed, he says, he was improperly prevented from having his C.O. claim considered by an appeal board (Pet. Br. 11–29). He relies on the principle of cases such as *United States* v. *Freeman,* 388 F. 2d 246 (C.A. 7), *Miller* v. *United States,* 388 F. 2d 973 (C.A. 9), and *Davis* v. *United States,* 410 F. 2d 89 (C.A. 8), that a request to reopen can properly be denied only where the new information tendered is insufficient on its face to justify a change in classification, and that a board may not, under the guise of refusing to reopen, evaluatively weigh the new information "against other elements in the situation" (*Miller* v. *United States, supra,* 388 F. 2d at 975), and on the basis of that appraisal determine that reopening would be inappropriate.

It is assumed herein that, despite the rather vague character of the asserted religious basis of petitioner's claimed conscientious objection to participation in war in any form, the new information he presented in the

representations contained in the Form 150 and in the accompanying letters (*supra,* pp. 8–13) did constitute a *prima facie* showing that he met the statutory standard for C.O. status (50 U.S.C. App. (Supp. IV) 456(j)). Cf. *Davis* v. *United States, supra,* 410 F. 2d at 94–95, n. 4; *Vaughn* v. *United States,* 404 F. 2d 586, 594–595 (C.A. 8) (dissent). It is our position, nevertheless, that the board was not automatically required, under the pertinent regulations, to reopen petitioner's classification on the basis of the showing he made, and that, in the circuumstances of this case, the board was amply justified in declining to do so.

1. As noted above, 32 C.F.R. 1625.2 provides that the local board *may* reopen a classification in the circumstances defined (*i.e.,* where the alleged new facts would justify reclassification if true). The permissive language of this section of the regulations contrasts sharply with the mandatory language of several of the companion provisions. For example, the following section, 32 C.F.R. 1625.3, provides that "[t]he local board *shall* reopen * * * upon the written request of the State Director of Selective Service * * *" (emphasis added). Similarly, and as previously noted, if the board determines that the newly alleged facts, if true, would *not* justify a change of classification (or that no new facts are presented), it is *prohibited* ("shall not") from reopening (32 C.F.R. 1625.4).[12] Thus, as the court below observed (A. 8) and as was emphasized in

[12] Compare also the prohibitory language of the proviso to 32 C.F.R. 1625.2 itself (referred to in note 11, *supra*) (forbidding reopening, except in the circumstances indicated, after the registrant has been ordered to report for induction).

Robertson v. *United States*, 417 F. 2d 440, 446–447 (C.A. 5), Section 1625.2 gives *discretion* to the board to reopen in the circumstances stated—it does not *require* it to do so. Such discretion, like any legally conferred discretion, may not, of course, be exercised arbitrarily. Cf. *United States* v. *Grier*, 415 F. 2d 1098, 1100–1101 (C.A. 4); *Townsend* v. *Zimmerman*, 237 F. 2d 376, 377 (C.A. 6); *Stain* v. *United States*, 235 F. 2d 339, 342–343 (C.A. 9); *Olvera* v. *United States*, 223 F. 2d 880, 883 (C.A. 5); *United States* v. *Vincelli*, 215 F. 2d 210, 212–213 (C.A. 2); *United States* v. *Bartelt*, 200 F. 2d 385, 389 (C.A. 7); *Smith* v. *United States*, 157 F. 2d 176, 181 (C.A. 4), certiorari denied, 329 U.S. 776. But it is important to stress that the regulation simply confers authority on the board to reopen a classification; it does not command reopening even where a *prima facie* case for reclassification is stated.

Indeed, it is difficult to understand the basis of petitioner's assertion that 32 C.F.R. 1625.2 *compels* the board to reopen whenever a registrant alleges facts which would, if true, justify the registrant's claim. This is so not only because of the discretionary language of the regulation, but also because of the impossible situation that boards would face if they lacked discretion to decline to reopen in appropriate cases.[13] Under petitioner's interpretation, a registrant

[13] As petitioner acknowledges (Pet. Br. 40), due process does not require that every determination by a local board be appealable. See *United States* v. *Beaver*, 309 F. 2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F. 2d 607, 611 (C.A. 9); *Klubnikin* v. *United States*, 227 F. 2d 87, 90–91 (C.A. 9), certiorari denied, 350 U.S. 975.

bent upon delay, and possessing no valid claim to exemption or deferment, could nonetheless postpone his induction indefinitely, for there would be nothing to prevent him, after unsuccessfully appealing a local board's refusal to grant one baseless request for reopening, from promptly filing another. The new request might be for the same or a different new classification, and the new facts alleged might be wholly different from or mere enlargements upon the earlier. However insincere or fictitious the board might believe the assertions to be, under petitioner's view it would be *required* to reopen so long as what might be termed a *prima facie* case [14] for reclassification was presented. Upon the board's denial of the classification sought, a new appeal would then lie to the appeal board. Thus, as the court below noted, petitioner's "contention, if upheld, would result in interminable delays in proceedings before Local Boards and indeed might frustrate the operation of the Selective Service System" (A. 9). Or, as observed in *United States ex rel. La Charity* v. *Commanding Officer*, 142 F. 2d 381, 382 (C.A. 2), "[I]f there were an appeal from every refusal to change a classification, a registrant could interminably delay his induction by successive requests and appeals * * *." [15] The likelihood of abuse under this interpre-

[14] Just what is meant by a "*prima facie* case" in these circumstances is less than clear. It presumably refers to a sufficient showing of entitlement to reclassification so that, absent any pertinent evidence to the contrary then in the possession of the board, an evaluative consideration of the claim made is required (see *infra*, pp. 32–36).

[15] Cf. *United States ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, 188 (D.N.J.), where the court stated: "The effect of providing for appeals from refusals to re-classify would be to open

tation would be particularly acute in a case where, as here, the registrant is close to the maximum age for induction, so that the delays resulting from the reopening procedures could conceivably allow the registrant to escape induction altogether, regardless of whether his claim for exempt or deferred status is upheld on appeal. Moreover, a logical corollary to petitioner's position is that a board would be required to reopen a registrant's classification, upon a *prima facie* showing of entitlement to reclassification, even *after* an induction order had been issued.[16] Were that the rule, the potential for disruption of the effective operation of the system would be further increased; indeed, a local board would never be in a position to know whether it would be able to meet its quota of inductees.

2. The courts have recognized, in a variety of contexts, that the authority conferred by 32 C.F.R. 1625.2 is discretionary in nature. In *United States* v. *Ransom*, 223 F. 2d 15, 18–19 (C.A. 7), the court noted that "even when a registrant has alleged facts which, if true, would entitle him to the requested classification, further investigation may not be necessary because a

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the door to innumerable appeals sufficient, perhaps, to 'bottleneck' the entire system of Selective Service."

[16] Of course, under Section 1625.2, a board is not to reopen "unless * * * [it] first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." But petitioner's position would presumably require a reopening if a *prima facie* case of entitlement to the requested classification were made out; alternatively, petitioner could argue that the board had in fact reopened in order to make the requisite finding. And, despite the language of this proviso, it is hardly a difficult matter for a registrant to assert that a change in status resulted from circumstances beyond his control.

basis for denying the classification may appear on the face of his evidence *or in the manner of its presentation*" (emphasis added). In *Woo* v. *United States*, 350 F. 2d 992 (C.A. 9), a registrant who had twice unsuccessfully claimed conscientious objector status without seeking administrative review presented to the local board, after being ordered to report for and passing his pre-induction physical examination, a third request (accompanied by newly alleged facts) which the court apparently treated as facially sufficient. Sustaining the board's refusal to reopen, the Ninth Circuit held that "a local board does not act arbitrarily and unreasonably in refusing to reconsider a claim of exempt status by a conscientious objector when the same claim has previously been considered and rejected and the registrant has not invoked the administrative remedies which would have brought about a thorough investigation and hearing of all aspects of his claim" (350 F. 2d at 995-996).[17] And in *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D. N.Y.), the court defined a *prima facie* case, in the context of the regulation here involved, as one presenting facts which, "if true *and uncontradicted by other information contained in his* [the registrant's] *file*," would suffice to warrant the requested classification (emphasis added). The qualification that the facts presented must not be contradicted by other known information

[17] Of course the instant case differs from *Woo* in that the claim to C.O. status involved here was petitioner's first. The *Woo* decision is nonetheless illustrative of the fundamental point that a request to reopen which presents a *prima facie* case for reclassification need not automatically be granted.

refutes the notion, on which petitioner's case essentially rests, that the local board, in determining whether a proper case for reopening has been presented, may not look beyond the four corners of the request and accompanying documents. See also *Parrott* v. *United States*, 370 F. 2d 388, 394–395 (C.A. 9), certiorari denied *sub. nom. Lawrence* v. *United States*, 387 U.S. 908; *United States* v. *Gearey*, 379 F. 2d 915, 922, n. 11 (C.A. 2).[18]

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[18] In accordance with the principle that the *classification* given a registrant by the board may not be judicially overturned if it has a "basis in fact" (*e.g.*, *Estep* v. *United States*, 327 U.S. 114, 122–123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380–381; *McKart* v. *United States*, 395 U.S. 185, 196; see 50 U.S.C. App. (Supp. IV) 460(b)(3)), the courts have frequently stated that refusal to reopen a classification is improper only if there is no basis in fact for the refusal. *United States* v. *Grier*, 415 F. 2d 1098, 1100–1101 (C.A. 4); *Petrie* v. *United States*, 407 F. 2d 267, 272–273 (C.A. 9); *Vaughn* v. *United States*, 404 F. 2d 586, 591 (C.A. 8); *Robertson* v. *United States*, 404 F. 2d 1141, 1146 (C.A. 5), reversed on other grounds, 417 F. 2d 440 (*en banc*); *Woo* v. *United States*, 350 F. 2d 992, 996–997 (C.A. 9) (Hamley, J., dissenting on other grounds); *Stain* v. *United States*, 235 F. 2d 339, 343 (C.A. 9); *United States* v. *Ransom*, 223 F. 2d 15, 17 (C.A. 7); *United States* v. *Davis*, 284 F. Supp. 93, 99 (S.D. Iowa), reversed on other grounds, 410 F. 2d 89 (C.A. 8); *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D. N.Y.); *United States* v. *Majher*, 250 F. Supp. 106, 110 (S.D. W. Va.). As observed in *Petrie* v. *United States*, *supra*, 407 F. 2d at 272–273, "While in most cases the 'basis in fact' test is applied to the final classification action of the local board, it is equally applicable to a refusal by the board to reopen the registrant's classification." Or, as noted in *United States* v. *Burlich*, *supra*, 257 F. Supp. at 911, the rule requiring a basis in fact for the board's original classificaton "is equally applicable to the action of the Board in determining whether or not changed conditions justify a reopening * * *."

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, and the board has neither any reason to question the truth or sincerity of the representations nor other information available to it strongly supporting the existing classification, reopening concededly is required. Refusal to reopen in those circumstances would be unreasonable and hence an abuse of discretion on the board's part. That was the situation in a number of the cases cited by petitioner and, as well, in the great majority of the cases in which local boards have been held to have erred in refusing to reopen. *E.g.*, *Howse* v. *United States*, 409 F. 2d 27 (C.A. 9); *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9); *Robertson* v. *United States*, 404 F. 2d 1141 (C.A. 5), reversed on other grounds, 417 F. 2d 440 (*en banc*); *Olvera* v. *United States*, 223 F. 2d 880 (C.A. 5); *United States* v. *Ransom*, 223 F. 2d 15 (C.A. 7); *Brown* v. *United States*, 216 F. 2d 258 (C.A. 9); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *United States* v. *Burlich*, 257 F. Supp. 906 (S.D. N.Y.); *United States* v. *Majher*, 250 F. Supp. 106 (S.D. W.Va.); *United States* v. *Scott*, 137 F. Supp. 449 (E.D. Wis.). But where, as in this case, the board has compelling reasons for questioning the veracity or sincerity of the allegations, it need not mechanically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), the board, as the court below noted (A. 9), can scrutinize the new representations made to it and can inquire further regarding them. And if the board's scrutiny of the representations is to be consistent with 32 C.F.R. 1625.2, it

must be accomplished as part of the process of determining whether it would be proper to reopen—both where an induction order is extant [19] and where, as here, the registrant is simply classified I–A. For if the board must reopen *in order to* scrutinize—if it may not inquire into or consider the truthfulness of the representations *until* it reopens or if, as petitioner alternatively contends, this inquiry itself constitutes a reopening—the discretion which the regulation gives to the board is illusory, and boards would be deprived of desirable flexibility in this regard. And, if petitioner's suggested approach were approved, a registrant could compel reopening (with its attendant delay) simply by making the necessary allegations, however inherently suspect.

3. In the instant case, the board had ample reason to question the truth of petitioner's allegations relating to his religious beliefs. To begin with, the timing of petitioner's claim gave rise to an understandable concern that it might be merely a delaying tactic. As the court observed in *Salamy* v. *United States*, 379 F. 2d 838, 842 (C.A. 10), "Certainly, sudden emergence of fully matured religious objections to military service, so soon after a deferment has been denied on an entirely unrelated ground, is a critical factor to consider in evaluating a registrant's sincerity."

Even more significant, however, were petitioner's repeated references in the Form 150 to his work in Appalachia (which he pointed to as the key indication of the sincerity of his religious beliefs, *supra*, p. 9)

[19] Of course, in this kind of case, a board would initially seek to determine whether there had been a change in circumstances beyond the registrant's control (see note 11, *supra*).

and the emphasis which several of petitioner's reference letters placed on this work (*supra*, pp. 11–12). These initial statements, viewed in the context of petitioner's earlier unsuccessful efforts to extend his occupational deferment, led to the board to wonder whether petitioner's belated claim to C.O. status was merely an attempt to reopen the issue of the relevance of his work in Appalachia to his draft status.

In order to subject petitioner's representations to further scrutiny, the board granted him the November 9 courtesy interview. The board wished to hear from petitioner personally concerning the depth of his claimed C.O. convictions and the nature of their alleged religious basis. Petitioner, the evidence shows, did not satisfy the board on either point. Although he was given full freedom to express himself as to why in his view he ought not to be drafted, the main thrust of his statement, according to the recollection of the chairman, concerned the importance of his work in Appalachia.[20] He presented, the chairman said, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration." In short, the chairman said, "it was the same deal, that he was seeking an occupational

[20] Petitioner's emphasis at the interview on his work is not surprising in light of the fact that in his letter to the board transmitting the completed Form 150, after mentioning that his "CO application" was enclosed, he requested an "interview * * * to discuss my appalachian" (*supra*, p. 13; A. 47). Petitioner's "appalachian", it is apparent, was his work. The letter thus provides further indication of the close association in petitioner's mind between his request for conscientious objector status and his occupational activities.

deferment" (*supra*, p. 14). Similarly, Board member Wolking's only recollection of petitioner's remarks was that he "felt like his work in Appalachia was very important" and that he "should have Conscientious Objector status because of that * * *" (*ibid.*). The clerk's résumé of the interview similarly states that petitioner "felt that military service would interrupt his work and there would be no one else to take his place" (*supra*, p. 15).

A few days later, in his letter of November 14, 1967 (*supra*, pp. 16–18), petitioner advised the board that he did not think all the relevant points had been covered at the courtesy interview and that he had not been able fully to express his position of conscience. He added nothing pertinent, however, beyond repeating his statement at the interview that he felt he was already serving his country's need for the work he was doing. His comments to the effect that the country's problems were too great to be ignored any longer, that no one should in his judgment be sent to another country while this country was in the mess it was in, and that, believing this nation's course in Vietnam to be wrong, he felt he would be serving its best interests if he followed his conscience (*supra*, p. 17) contributed nothing particularly germane. The tone of the letter, moreover, may have given the board added reason to doubt that petitioner was a genuine conscientious objector. Petitioner advised that he realized the board had him "over the barrel" in that it had the law behind it. He said he felt that the board was going to try to draft him in spite of the feelings he had expressed and that he did not doubt its sincerity or its right by law to do so.

Noting that he had not yet made up his mind whether he would submit to induction (in the event the board rejected, as he expected it to, his C.O. claim), he said that if he decided to submit he would organize resistance among his fellow soldiers and do what he could to teach them the truth about Vietnam and the principles of non-violence, and that if he decided to resist he would make "the biggest stink about it possible." He knew in any case, he said, that he would face prison and he was not afraid of the prospect (*supra*, pp. 17–18).

Against this background, the board could not only legitimately wonder whether these were the remarks, and this was the attitude, of an actual conscientious objector; it could also properly evaluate the representations made in the Form 150 in the light of these substantially contemporaneous statements, and conclude that no *prima facie* case of entitlement to C.O. status, within the meaning of the pertinent decisional law, had been presented. The board could, in other words, in determining whether a *prima facie* case had been made out so that reopening was proper, appropriately discount the written representations accompanying the request by the substantially contemporaneous statements petitioner had made at the interview and in his subsequent letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations—and the record, it is submitted, fairly reflects that they were important if not indeed the decisive grounds for the board's action—the board did not engage in such an evaluative weighing of an other-

wise sufficient *prima facie* showing as would in effect constitute a reopening of petitioner's classification.[21]

4. Our view as to the proper construction of 32 C.F.R. 1625.2 does not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening, as petitioner asserts (Pet. Br. 12, 21–22). This contention assumes that the classification process consists merely of inquiring into the truth or falsity of the facts stated by the registrant. This is not the case. Ordinarily, in fact, classification requires the local board to assemble and evaluate all the pertinent actual facts, and to determine what weight to assign to various elements in the registrant's sometimes complex situation. For example, in processing a request for an occupational deferment, the board weighs the relative importance of the registrant's civilian work against the nation's need for his military service. Similarly, in evaluating a claim to a hardship deferment, the board judges the extent to which the claimed dependent requires the registrant's continued financial support from his civilian wages. Certainly not every request for exemption or deferment involves scrutiny of the represented facts for falsity; although this will sometimes be a

[21] Cf. *United States* v. *Hill*, 221 F. 2d 437, 441 (C.A. 7), certiorari denied, 349 U.S. 964, where, in a similar situation, the local board determined that the registrant, whose request for reopening contained representations sufficient on their face to justify the classification sought, had nonetheless failed to present a *prima facie* case for the classification because at an interview to which the board invited him he was so evasive in his answers that the board did not believe what he had written. That, essentially, was what occurred here.

factor, normally the truth of the representations is assumed. Thus, there remains ample room under our interpretation for the procedure whereby a classification is reopened for the purpose of considering and evaluating new facts, but the registrant, after reconsideration, is given the same classification he previously had—without any implication that the representations in the reclassification request were untrue. Indeed, it is important to the efficient functioning of the system for local boards to have such flexibility. Otherwise, they might well refuse to consider new information in a thoroughgoing fashion, and decline to grant courtesy interviews such as was given to petitioner. In short, both the system and individual registrants would suffer from a rigid rule that any extended consideration of newly submitted facts is tantamount to a reopening of the registrant's classification, with the procedural consequences that that entails.

B. THE BOARD DID NOT ASSUME PETITIONER WAS SINCERE IN HIS CLAIM TO BE A CONSCIENTIOUS OBJECTOR

Petitioner argues that the board accepted everything he said as true and assumed that he was sincere in his asserted religious beliefs (Pet. Br. 13–14, 26). The record, however, will not support that interpretation. The testimony on which petitioner relies (A. 71, 72, 84, 86) has been referred to previously (*supra*, pp. 20–21). To be noted, in the first place, is that only two members of the board—Chairman Sherman and Member Wolking—were questioned on the point in issue. The other members—Downes and Rickert—said nothing pertinent. When the statement of the

chairman is carefully examined, it is clear that all he relevantly meant to say was that "assuming everything that [petitioner] said down there at that time [*i.e., at the courtesy interview of November 9*] to be so, he still did not make out a case for a conscientious objection"—because "his claim [at the interview] was principally on his job, the work he was doing * * *" (*supra*, p. 20). Nothing in the chairman's testimony can be read as suggesting that he accepted the sincerity of *everything* that petitioner said, including the representations made in the Form 150. Indeed, Sherman's other testimony strongly indicates that he doubted petitioner's allegation of religiously based opposition to participation in all wars.

The chairman testified, for example, that following the courtesy interview the three members present discussed the case briefly and came to the unanimous conclusion that there was no basis or justification for reopening the classification (*supra*, p. 16). And in response to an inquiry whether the board's decision not to reopen was made on that day, he said (A. 69):

> That's right, that there was no justification, that it was the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration.[22]

Member Wolking's testimony, on which petitioner principally relies (Pet. Br. 13), is at best ambiguous.

[22] Cf. the chairman's testimony at A. 68: "We * * * listened to him [at the interview] to see if he had any merit, or any difference, or changed his position. Principally it was the same deal, that he was seeking occupational deferment from what his testimony was * * *."

In its context, we believe that his statement, "[w]e assumed he was sincere, that's right," was meant to convey no more than that the members assumed petitioner was sincere in his remarks at the interview about "the importance of his work in Appalachia" (*supra*, p. 21; A. 84). Indeed, Wolking could not have meant that he assumed petitioner was sincere in making his C.O. claim because in the witness's earlier statement he indicated precisely the opposite—that his only recollection of petitioner's remarks at the interview was that he "felt like his work in Appalachia was very important and * * * he * * * should have Conscientious Objector status because of that" (*supra*, p. 14; A. 83). Furthermore, Wolking was one of the three members who, according to the chairman, unanimously concluded following the interview that no reason for reopening had been demonstrated. The assumption, in short, that Sherman and Wolking meant to say that they regarded petitioner as sincere in his claim to being a conscientious objector is not reconcilable with their testimony viewed as a whole. Moreover, if they assumed petitioner was sincere in that representation, it would have been entirely inconsistent, and indeed inexplicable, for them to have voted not to reopen.

The courts below seem to have shared the board members' doubts as to petitioner's sincerity. Both courts indicated that in their view petitioner had presented the C.O. claim in bad faith. In sentencing petitioner the district court commented that petitioner had pretty well "worn out" his claim for C.O. status, that it had not been asserted for "many, many

months," and that in the court's judgment he had "suffered an instant conversion" when he realized that "the platoon sergeant was about to blow his whistle" (A. 12; Tr. 209). The court of appeals similarly remarked that petitioner's C.O. claim had "fooled" neither the board members nor the trial judge (A. 12).

C. THE DENIAL OF AN ADMINISTRATIVE APPEAL TO A REGISTRANT IN PETITIONER'S SITUATION IS NOT IMPERMISSIBLY DISCRIMINATORY

There is no merit in petitioner's contention that his inability to secure appeal board review of his claim to conscientious objector status resulted in invidious discrimination (Pet. Br. 39–42). Petitioner points out that a registrant whose C.O. claim is denied at the time of his original classification is entitled under the regulations to appeal administratively as of right—without regard to the merit of the claim or to whether or not a believable *prima facie* case therefor is made. He further notes that a registrant whose claim is denied following reopening and reconsideration of an existing classification can similarly appeal as of right from the board's decision on the merits (see *supra*, pp. 26–27). Thus, he concludes, it is discriminatory and a denial of due process to refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a credible *prima facie* case of entitlement to that status—or because the board, as here, rejects the claim as insincere following an interview.

There is nothing unreasonable, however, in requiring that a registrant who first advances a claim to conscientious objector status after he is originally classified make a credible *prima facie* showing that he

is entitled to that classification before the rights to a personal appearance and an administrative appeal, with the attendant delays, should accrue. *Boyd* v. *United States,* 269 F. 2d 607, 611 (C.A. 9); *Klubnikin* v. *United States,* 227 F. 2d 87, 90–91 (C.A. 9), certiorari denied, 350 U.S. 975; *United States ex rel. La. Charity* v. *Commanding Officer,* 142 F. 2d 381, 382 (C.A. 2). Nor is it unreasonable to permit the board, before reopening, first to satisfy itself through inquiry that the claim at least has been presented in good faith (see *supra,* pp. 32–41).[23] Nothing in *Miller* v. *United States,* 388 F. 2d 973 (C.A. 9), relied on by petitioner, is to the contrary. All that *Miller* relevantly held was that it would be impermissibly discriminatory for the regulations to be read as permitting a board to distinguish, in deciding whether to grant reopening, between "prima facie situations *of legal equality*" (emphasis added) (388 F. 2d at 976–977).[24]

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[23] Belief that the claim is in good faith is not, of course, equivalent to determining the ultimate issue of its merit. A sincere claimant to conscientious objector status may still fail to qualify under the statutory standard. Cf. *United States* v. *Seeger*, 380 U.S. 163, 166–169, 185–188.

[24] Petitioner, noting the court of appeals' comment that his November 14 letter (erroneously referred to as his letter of November 17, see note 9, *supra*) "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" (A. 10; Pet. Br. 31), argues that the court erroneously failed to recognize that if a registrant's objection to participation in war is based partly on religious training and belief and partly on other factors he is nevertheless entitled to C.O. status (Pet. Br. 30–37). We do not dispute the proposition that a conscientious objection to military

II. THE LOCAL BOARD CONSIDERED PETITIONER'S REQUEST FOR CONSCIENTIOUS OBJECTOR STATUS FAIRLY AND COMPETENTLY

A. THE BOARD MEMBERS GAVE ADEQUATE CONSIDERATION TO PETITIONER'S STATEMENTS IN THE SSS FORM 150

Petitioner's claim that the local board failed to consider his request for conscientious objector status fully and fairly (Pet. Br. 42–47) is unpersuasive. It is true, as petitioner notes (Pet. Br. 43), that Member Downes only "scanned" petitioner's Selective Service file prior to the November 9 courtesy interview and that he could not recall whether he had read the completed SSS Form 150 *at that time* (A. 75). But Downes definitely recalled reading the Form 150 at

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service that proceeds partly on religious and partly on non-religious grounds meets the statutory test. The point, however, is inapposite. The board here, as petitioner acknowledges (Pet. Br. 30), did not reject petitioner's claim because it concluded that it was based on non-religious as well as religious considerations. The evident basis on which it rejected the claim, as appears from the earlier discussion and as the court of appeals' opinion generally indicates, was that, from petitioner's own showing, collectively viewed, he was really seeking an occupational deferment under the trappings and verbiage of a C.O. claim—that the stated beliefs, in short, were not sincerely and genuinely entertained.

For the same reason—the fact that the board's rejection of the C.O. claim was based on its view that the claim was not genuine—the question whether Congress can constitutionally limit the conscientious objector exemption to those whose opposition to participation in war is based upon religious training and belief (see Pet. Br. 37–39) is not presented on the instant record. Resolution of the issues in this case, therefore, does not depend upon the Court's decisions in *United States* v. *Sisson*, pending on direct appeal, No. 305, this Term, and *Welsh* v. *United States*, pending on writ of certiorari, No. 76, this Term.

or prior to the meeting of January 11, 1968, at which time the vote not to reopen was taken, and he testified that petitioner's statements in the form constituted "one of the things that prompted me to feel" that the classification ought not to be reopened (A. 79–80). Since the pertinent decision was not made until the January meeting, the member's uncertainty as to whether he had read the form before the November interview lacks the significance which petitioner would attribute to it. Moreover, contrary to petitioner's further suggestion (Pet. Br. 44), the acknowledgment by Downes that the only occasion he would have had to consider petitioner's file would have been during or prior to a board meeting—*i.e.*, that he never took the file home with him to "study it" (A. 80)—does not indicate that Downes' consideration of petitioner's case was either superficial or constitutionally inadequate. All the other members testified that they read the Form 150 at some time prior to the vote (A. 67, 68, 71, 72, 91 [Chairman Sherman], 81–82 [Wolking], 88 [Rickert]).[25] Petitioner's speculations as to the degree of care with which the members examined the Form 150 raise no issue of constitutional dimensions.

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[25] Member Wolking testified that, while he did not specifically recall reading the form, he knew that he "absolutely did" read it—at the time of the November interview—because "[i]f [petitioner's] case came before the Board I would have read whatever was in the Form 150" (A. 82). Rickert, the member not present at the interview, said he read the file prior to the January meeting and that he recalled the completed Form 150 (A. 88). All four members, as noted previously (*supra*, p. 22), testified that they felt they had given thoroughgoing and unbiased consideration to petitioner's case.

B. THE BOARD WAS NOT SHOWN TO BE INCOMPETENT

Nor is there validity to petitioner's contention that the board members exhibited such misunderstanding of the applicable law as to suggest that they were incompetent to pass intelligently on his C.O. claim (Pet. Br. 47–49).

Chairman Sherman, a lawyer, was not "confused regarding the distinction between" I–O [26] and I–A–O [27] classifications, as petitioner asserts (Pet. Br. 48). It is true that at one point in his testimony, perhaps through inadvertence, he gave the wrong designation, I–A–O, in describing the classification into which registrants opposed to participation in war in any form are placed (A. 91). He correctly noted, however, that such registrants are "given an opportunity to serve in some institution of his choosing for a period of, I believe it is two years * * *" (A. 91).[28] The chairman's error, in short, concerned the label, not the substance, of the category. Nor is it significant that at the trial Sherman was uncertain whether there was a special Selective Service classification for registrants who are conscientiously opposed to combatant service but who are willing to perform non-combatant duty (A. 90–91), particularly since the classification referred to (I–A–O) was not the classification petitioner had sought.

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[26] *I.e.*, registrants conscientiously opposed to participation in war in any form, including combatant and non-combatant service (32 C.F.R. 1622.14).

[27] *I.e.*, registrants conscientiously opposed to combatant service only (32 C.F.R. 1622.11).

[28] See 32 C.F.R. 1660.10, 1660.20, 1660.21.

Petitioner's only other criticism of Sherman's competence (Pet. Br. 48) involves the chairman's spontaneous definition of a conscientious objector, given under cross-examination by defense counsel, as an individual who has conscientious scruples against "taking another person's life" under any circumstances (A. 90). Petitioner notes that this is not the definition given in the statute (which speaks in terms of opposition to "participation in war in any form," see 50 U.S.C. App. (Supp. IV) 456(j)), and that a person who is willing to kill in self-defense may still be classified as a conscientious objector (Pet. Br. 48). The variance between the chairman's definition and the statutory one, however, was not in issue; moreover, the chairman immediately corrected his slip (A. 90). The suggestion that an inadvertence of this sort showed prejudicial incompetence is insubstantial.

Petitioner says that Member Wolking was unaware of the classification that is given to conscientious objectors (Pet. Br. 48). All that the record indicates, however, is that the member made no response when he was asked this question (A. 85). When the question was repeated, Wolking, without referring to a classification by symbol, said that a registrant so classified "would be offered a position in some hospital or some work that would permit him to serve in some other manner" (A. 85). This answer was of course correct, as petitioner's counsel acknowledged (A. 85). Thus, here again, the member's apparent uncertainty concerned only the symbolic tag assigned to the classi-

fication by the regulations; he was fully aware of the substantive significance of the category.[29]

It is accurate, finally, as petitioner notes (Pet. Br. 47–48), that Member Downes exhibited confusion under cross-examination as to the role of the board in processing conscientious objector claims. After the member had stated his understanding that a conscientious objector could serve in some civilian capacity in lieu of being drafted into the military, and after defense counsel had asked if it was not true that the board has to make that decision and that the registrant "can't do it just on his own," Downes said: "The draft board, I thought now, was involved primarily with determining the availability of people" (A. 78). While the quoted comment was not responsive to the question, the member's attempt a moment later to answer the question was cut off by the court's ruling that although counsel had full liberty to explore for arbitrariness, capriciousness, or unfairness, he would not be permitted to cross-examine a board member with respect to the content of the law or its application (A. 78). Even if it is assumed that Downes could not have answered the question adequately, this single aberration on the part of one member of the board hardly demonstrates that the board as a body incompetently handled petitioner's case. Indeed, rather than illustrating incompetence

[29] Petitioner notes (Pet. Br. 48) that Wolking appeared confused as to whether, in signing the Form 150, petitioner had indicated unwillingness to perform civilian service in the national interest (A. 85). The discussion on this matter terminated inconclusively as the result of a ruling that the point was not relevant (A. 85–86).

on the part of the board, the incidents discussed herein, viewed cumulatively, reveal the extraordinary lengths to which the court permitted defense counsel to go in exploring through cross-examination the mental processes of the members of the board.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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